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# In the Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD., PETITIONER

*v.*

TSUI YUAN TSENG

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*

FRANK W. HUNGER
*Assistant Attorney General*

EDWIN S. KNEEDLER
*Deputy Solicitor General*

JONATHAN E. NUECHTERLEIN
*Assistant to the Solicitor General*

ROBERT S. GREENSPAN
ALISA B. KLEIN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

DAVID R. ANDREWS
*Legal Adviser*

DAVID S. NEWMAN
*Attorney-Adviser*
*Department of State*
*Washington, D.C. 20520*

NANCY E. MCFADDEN
*General Counsel*

PAUL M. GEIER
*Assistant General Counsel*

DALE C. ANDREWS
*Deputy Assistant General Counsel*
*Department of Transportation*
*Washington, D.C. 20590*

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## QUESTIONS PRESENTED

1. Whether a passenger who suffers personal injury within the scope of the Warsaw Convention (which addresses international transportation by air), but who cannot meet the conditions set forth in Article 17 of the Convention for liability under the Convention itself, may nonetheless seek relief under state law.

2. Whether the court of appeals erred in summarily affirming the district court's determination that petitioner's treatment of respondent's claim for lost baggage satisfies the "fraud" exception to the Convention's written notice requirement under Article 26(4).

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000 (49 U.S.C. 40105 note), popularly known as the "Warsaw Convention," was designed to achieve two basic purposes: to "foster uniformity in the law of international air travel," *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 230 (1996), and to "limit[] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry," *Eastern Airlines* v. *Floyd*, 499 U.S. 530, 546 (1991). To those ends, the Convention prescribes an extensive set of legal principles generally applicable "to all international transportation of persons, baggage or goods performed by aircraft." Art. 1(1). See generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

At the core of the Convention is a series of provisions governing the nature and scope of a carrier's liability for harms occurring in the course of international air travel. The Convention divides such harms into three categories: personal injury (Article 17), damaged or lost baggage (Article 18), and damage due to delay (Article 19). Article 17, which is at issue here, makes carriers "liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." It is now generally accepted that a passenger satisfying the liability criteria set forth in Article 17 may bring a cause of action against a carrier directly under the Convention. See *Benjamins* v. *British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979); *St. Paul Ins. Co.* v. *Venezuelan Int'l Airways*, 807 F.2d 1543 (11th Cir. 1987); *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan Am World Airways*, 737 F.2d 456, 459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 408-415 (9th Cir. 1983); cf. *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1282 (2d Cir.), cert. denied, 502 U.S. 920 (1991).

At the time of the Convention, carriers commonly made their services contingent on a passenger's contractual waiver of the right to bring suit for personal injury, and such waivers were often enforceable in court. See Pet. 12-13 n.8; Pet. App. 53a-54a. To ensure that carriers could not short-circuit Article 17 (as well as Articles 18 and 19) in that manner, the delegates to the Convention added Article 23, which nullifies "[a]ny provision tending to relieve the carrier of liability." Moreover, to reduce litigation concerning questions of fault, the delegates added Article 20, which, when combined with Article 17, creates a presumption of liability that a carrier can rebut only by

"prov[ing] that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Art. 20(1).

The creation of a non-waivable cause of action for personal injury under Article 17, together with the presumption of liability added by Article 20, was part of a larger compromise designed to balance the interests of passengers against the interests of the nascent airline industry. Two key provisions of the Convention protect that industry's interests. First, Article 22(1) limits the amount that can be recovered in the event of an accident-related death or bodily injury. The delegates to the Convention set that limit at 125,000 francs, the equivalent in 1929 to approximately $4,900 dollars. See Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 499 & n.10; see also *Floyd*, 499 U.S. at 546. That was a "low amount even by 1929 standards," *Floyd*, 499 U.S. at 546, and, over the years, foreign and domestic airlines have entered into voluntary, private agreements to waive major aspects of the liability limitations imposed by the Convention. See *id.* at 549.[1]

Second, as a counterpart to Article 23's prohibition on attempts by carriers to circumvent the Convention's liability regime through contractual waiver clauses, the

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[1] In the most recent such agreement, completed in 1996, several dozen major airlines agreed to waive any limit on compensatory liability for claims arising under, and satisfying the liability conditions of, Article 17. (Punitive damages remain unrecoverable. See generally *Lockerbie*, *supra*; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991).). Those airlines further agreed to waive the defense of non-negligence under Article 20 (and thereby effectively agreed to strict liability) for such claims in an amount up to 100,000 "Special Drawing Rights," which, at the current exchange rate, equal approximately $135,000. See Pet. App. 8a; *International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by D.O.T. Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997).

delegates added a provision barring passengers from seeking to circumvent that regime, and in particular its limitation on damages, by bringing suit under domestic law outside the terms of the Convention. That provision, Article 24, gives preemptive effect to Articles 17, 18, and 19, which, as discussed, respectively address a carrier's liability for personal injury, damaged or lost baggage, and delay.

Article 24(1) addresses the latter two categories of liability: "In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Article 24(2) then addresses personal injury: "In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." The delegates added the final clause ("without prejudice to the questions * * *") because they could not reach consensus on the availability of wrongful death actions and, more generally, on "the questions of who may recover and what compensatory damages are available to them," *Zicherman*, 516 U.S. at 225; those secondary questions they therefore "left to domestic law." See *ibid.*; see also, *e.g.*, *Dooley* v. *Korean Air Lines Co., Ltd.*, No. 97-704 (to be argued Apr. 27, 1998). In contrast, the delegates could and did agree on rules governing the antecedent question of *which events* would subject carriers to personal-injury liability, and those rules appear in Article 17. The principal dispute in this case is whether *those* rules are exclusive: whether, despite Article 24, a plaintiff may sue for personal injury under local law if she cannot satisfy the conditions of liability under Article 17 for events occurring within the scope of the Convention.

2. a. On May 22, 1993, respondent Tsui Yuan Tseng arrived at John F. Kennedy International Airport in New York to board a flight to Tel Aviv. Pet. App. 3a-4a. The

flight was provided by petitioner El Al Israel Airlines, Ltd., a carrier principally owned by the State of Israel. C.A. App. A9-A10. Respondent went to El Al's terminal, presented her ticket and U.S. passport to an El Al security guard, entered the terminal building, and proceeded to a security area, where she was asked routine questions about her destination. Pet. App. 4a. Based on her answers, which the security guard considered "illogical," respondent was classified as a "high risk" passenger. *Ibid.*

Respondent was taken to a private room, where she was subjected to a security search for explosives and detonating devices. She was told to lower her pants to mid-hip level and to remove her shoes, jacket, and sweater. A female security guard then conducted an exhaustive manual search of respondent's entire body outside of her clothing. The search lasted 15 minutes. It conformed to El Al procedures, which had been adopted pursuant to Federal Aviation Administration regulations. Pet. App. 4a. The parties appear to agree that respondent did not object to the search and that she had the option of refusing to submit to it, thereby forfeiting the right to board the flight. The parties appear to disagree, however, about whether respondent was told (or should reasonably have known) that she could assert that option. See Br. in Opp. 2-3.

After the search, El Al personnel determined that respondent did not present a security risk, and they permitted her to board the flight. Respondent later testified that she was "really sick and very upset" during the flight, that she was "emotionally traumatized and disturbed" during her month-long trip to Israel and thereafter, and that she ultimately had to undergo medical and psychiatric treatment. Pet. App. 4a. Respondent did not claim, however, to have suffered any physical injury. *Id.* at 4a-5a, 28a.

b. Respondent brought suit in state court. She alleged that petitioner "assaulted, and falsely imprisoned and physically and mentally abused her," and she sought $5

million in damages under state-law theories of tort. C.A. App. A13. Petitioner removed the case to federal court pursuant to 28 U.S.C. 1441(d), which authorizes the removal of any action against a "foreign state" as defined in 28 U.S.C. 1603(a). Pet. App. 5a; see C.A. App. A9-A10.

After discovery and a trial, the district court dismissed respondent's claim for personal injury. Pet. App. 26a-28a. The court first noted that Article 17 creates a cause of action only for injuries suffered as a result of an "accident," which this Court has defined as "an unexpected or unusual event or happening that is external to the passenger." Pet. App. 26a (quoting *Air France* v. *Saks*, 470 U.S. 392, 405 (1985)). The court determined that, because petitioner "erroneously" subjected respondent to an "unexpected" full-body search, the search "is fairly accurately characterized as an accident," and the Convention therefore "applies." *Id.* at 27a-28a. The court then dismissed respondent's personal injury claim on the ground that Article 17 allows recovery only for bodily injury and not for the purely psychic injury that respondent had alleged. *Id.* at 28a (citing *Floyd*, 499 U.S. at 552).

c. The court of appeals reversed. Pet. App. 1a-23a. The court first ruled that the search did not qualify as an "accident" within the meaning of Article 17, reasoning that security searches "are an anticipated aspect of international travel," that the search at issue "was part of the airline's normal procedure," and that "the Convention does not aim to derogate from the efforts of international air carriers to prevent violence and terrorism, efforts which are widely recognized and encouraged in the law." Pet. App. 11a-12a. As a result, "under the terms of Article 17 of the Warsaw Convention, [petitioner] may not be held liable in damages to [respondent]." *Id.* at 14a.

The court then held, however, that the Convention does not provide the exclusive cause of action for passengers who sustain personal injuries in the course of interna-

tional air travel. Pet. App. 14a-22a. According to the court, Article 24 "clearly states that resort to local law is precluded only where the incident is 'covered' by Article 17, meaning where there has been an accident, either on the plane or in the course of embarking or disembarking, which led to death, wounding or other bodily injury." *Id.* at 15a. To preclude resort to local law where a plaintiff cannot meet the liability criteria under Article 17, the court believed, "would require rewriting Article 24 or Article 17, a task only the signatories to the Convention may undertake." *Id.* at 15a-16a.

The court sought support for its construction of Article 24 in the drafting history of the Convention, Pet. App. 16a-17a, and in the Convention's underlying purposes, *id.* at 18a-23a. The court recognized that "one of the two primary purposes of the Convention was to shield carriers from financial catastrophe following in the wake of a major accident," but it concluded that "the Convention does not purport to insulate carriers from the ordinary risks of doing business, such as keeping their facilities in good repair." *Id.* at 19a. Finally, the court held that, as interpreted by this Court in *Zicherman*, "the Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law, here state law." *Id.* at 21a.

## DISCUSSION

The court of appeals held that, despite Article 24 of the Warsaw Convention, a passenger who suffers personal injury in the course of international air travel, but who cannot meet the conditions set forth in Article 17 for liability under the Convention itself, may nonetheless seek relief under state law. That decision, like the Third Circuit's similar decision in *Abramson* v. *Japan Airlines*, 739 F.2d 130 (1984), cert. denied, 470 U.S. 1059 (1985), conflicts with the decisions of the Fifth Circuit in *Potter* v. *Delta Air*

*Lines*, 98 F.3d 881 (1996), and of the British House of Lords in *Abnett* v. *British Airways PLC*, 1 All E.R. 193 (1996) (Pet. App. 34a-65a). Because the legal issue on which those courts have split is recurring and important, this Court should grant the petition for a writ of certiorari, but limit review to the first question presented.

1. a. The substantive scope of the Convention is defined in Article 1(1), which provides that "[t]his convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft," either "for hire" or "gratuitous[ly]." That language is quite general, and Article 17 clarifies that, in the specific context of suits for personal injury, the Convention addresses a carrier's liability to "passenger[s]" for harms occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." See generally *Air France* v. *Saks*, 470 U.S. 392, 401-402 (1985). Because the Convention's preemptive effect on local law extends no further than the Convention's own substantive scope, a carrier is indisputably subject to liability under local law for injuries arising outside of that scope: *e.g.*, for passenger injuries occurring before "any of the operations of embarking." Cf. Pet. App. 20a-21a (expressing concern that wrongdoers not escape liability for accidents on airport escalators).

The question presented here, however, is whether a carrier can be liable under local law for personal injury arising *within* the scope of the Convention—for passenger injury sustained "on board the aircraft or in the course of any of the operations of embarking or disembarking"—if the injured party cannot meet the conditions set forth in Article 17 for liability under the Convention itself. There are two principal circumstances in which that issue of "exclusivity" arises. The first is where the event causing the plaintiff's injury does not qualify as an "accident" within the meaning of Article 17 because it was not

"unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405 (hearing loss caused by normal loss of cabin pressure does not qualify as "accident"). The second is where, irrespective of whether the harm-causing event was an "accident," the harm itself does not take the form of "death or * * * bodily injury" within the meaning of Article 17. See *Eastern Airlines* v. *Floyd*, 499 U.S. 530 (1991) (Article 17 does not create cause of action for mental anguish caused by closely averted crash). In each of those circumstances, this Court has expressly declined to address whether a plaintiff, unable to seek recovery under the Convention, may nonetheless bring a cause of action under state law. See *Saks*, 470 U.S. at 408; *Floyd*, 499 U.S. at 553.

That issue of exclusivity is now ripe for this Court's review. The Second Circuit's decision in this case, like the Third Circuit's decision in *Abramson*, is in irreconcilable conflict with the Fifth Circuit's decision in *Potter* and with the House of Lords' recent decision in *Abnett*. See Pet. App. 18a-21a (noting conflict with *Potter* and *Abnett*, which court identified as *Sidhu* v. *British Airways PLC*); *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997) (noting circuit conflict on issue presented here, but declining to resolve issue because it had not been properly preserved), cert. denied, 118 S. Ct. 1042 (1998). This Court's review is necessary to resolve that conflict for the benefit of American courts as well as foreign courts, which often look to this Court for guidance in interpreting the Warsaw Convention. See, *e.g.*, Pet. App. 63a. This particular case also presents important policy concerns about the extent to which routine security searches can subject a carrier to liability under domestic law.[2]

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[2] For much of the life of the Convention, the United States has engaged in multilateral negotiations with other signatories in efforts to

b. In our view, this case is an appropriate vehicle for deciding the exclusivity issue that has split the courts. First, the parties and courts below have all assumed—correctly, we believe—that the security search in question, although conducted in an airport terminal building before the flight, occurred in "international transportation" (Art. 1(1)): that is, "in the course of any of the operations of embarking or disembarking" (Art. 17). See, *e.g.*, Pet. App. 14a.[3] It is therefore undisputed that, in that respect, the events at issue fall within the scope of the Convention as defined by Articles 1(1) and 17.

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reform the legal regime arising under the Convention. Under the auspices of the International Civil Aviation Organization (ICAO), the United States is currently engaged in such negotiations, and (as part of a comprehensive package of proposed amendments) has agreed to a proposal to clarify the language of Article 24 to confirm the broad extent of the Convention's exclusivity in personal injury cases: "In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention[.]" Approved Draft of the Legal Comm., ICAO, Proposed Art. 23(1) (May 9, 1977). Those negotiations, however, are at a very early stage, and they accordingly do not warrant deferral by this Court of a resolution of the important question presented here.

[3] In determining whether a plaintiff was injured during operations of embarkation, the courts of appeals focus on the plaintiff's location and activity and on the extent to which the airline exercised control over the plaintiff at the time the injury occurred. See, *e.g.*, *Schroeder* v. *Lufthansa German Airlines*, 875 F.2d 613, 617 (7th Cir. 1989); *Evangelinos* v. *Trans World Airlines*, 550 F.2d 152, 155 (3d Cir. 1977) (en banc); *Martinez Hernandez* v. *Air France*, 545 F.2d 279, 282 (1st Cir. 1976), cert. denied, 430 U.S. 950 (1977); *Day* v. *Trans World Airlines*, 528 F.2d 31, 33 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). Cf. *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (9th Cir.) (applying slightly different "totality of the circumstances" test), cert. denied, 431 U.S. 974 (1977). The security search at issue here would appear to satisfy those tests.

It is also undisputed that respondent could not meet the conditions for liability set forth in Article 17. The court of appeals reached that conclusion on the ground that the search in question was not an "accident" within the meaning of Article 17. See Pet. App. 14a. Although petitioner had urged the court of appeals to affirm the district court's finding that the search was in fact an "accident," petitioner now concedes, for purposes of this Court's review, that the court of appeals' disposition of that threshold issue was correct (see Pet. i (question presented), 7), and respondent agrees (see Br. in Opp. 13). We believe that it would be appropriate for this Court to accept the parties' agreement on that issue: a routine security search that complies with federal standards, as this one apparently did (see Pet. App. 4a), should not be characterized as an "accident." But even if there were some basis for uncertainty about the proper characterization of this search, cf. *Saks*, 470 U.S. at 405; Br. in Opp. 2-3, this case would still present the core question of the Convention's exclusivity. That is so because respondent's claim fails to meet an independent condition for liability under Article 17: she has not alleged that she suffered a "bodily injury" within the meaning of that provision. See Tseng C.A. Br. 16, 19, 20, 24; see also Br. in Opp. 4.[4]

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[4] Disputes about the Convention's exclusivity arise most commonly in cases (such as *Saks*, *Abramson*, and *Potter*) in which the plaintiff has suffered physical injuries but the cause of those injuries was not an "accident," rather than in cases (such as *Floyd*) in which the plaintiff's injuries *were* caused by an "accident" but are not "bodily" in character. In our view, however, the ultimate answer to the exclusivity question should be the same in both situations. Either the Convention permits liability under local law if the liability criteria of Article 17 are unmet, or it does not; there is no persuasive reason why the answer to that question should turn on *which* criterion is unmet. But cf. Pet. App. 27a-28a (seeming to assume that Convention "applies," and is given pre-

Finally, it bears noting that, in both the district court and the court of appeals, respondent relied on Article 25 of the Convention, in part as a basis for "tak[ing] the case outside the Convention's limitations of liability." Pet. App. 27a. Article 25 provides, in relevant part:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wil[l]ful misconduct.

If Article 25 were at issue in this case, it could complicate the exclusivity analysis, because, under one possible interpretation, it forecloses a carrier that has engaged in "willful misconduct" from availing itself not just of the liability limits of Article 22, but also of any provision of the Convention that "exclude[s] * * * liability"—including, perhaps, the core exclusivity provisions of Article 24. But cf. *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1285 (2d Cir.), cert. denied, 502 U.S. 920 (1991).

But Article 25 is not at issue in this case. After trial, the district court specifically found, as a factual matter, that petitioner's actions were not willful. See Pet. App. 27a. In the court of appeals, respondent did not squarely challenge that factual finding as clearly erroneous; instead, in invoking Article 25, she argued principally that the kinds of torts alleged here are "willful" as a categorical matter and that anything "willful" cannot qualify as an "accident" under Article 17. See *id.* at 13a; cf. Tseng C.A. Reply Br. 6. In her brief in opposition in this Court, how-

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emptive effect, if and only if injury-causing event qualifies as an "accident"); *Krys*, 119 F.3d at 1518 n.8 (similar).

ever, respondent does not even cite Article 25 (although, in passing, she continues to characterize petitioner's conduct as "willful," see Br. in Opp. 1, 12, 14). Because respondent has not preserved any argument that Article 25 affects the exclusivity analysis in this case, see Sup. Ct. R. 15.2, and also because the court of appeals left undisturbed the district court's specific factual finding that petitioner's actions were not "willful," we believe that Article 25 presents no obstacle to this Court's review of the exclusivity issue presented here.[5]

c. On the merits, we agree with petitioner that Article 24 bars actions under local law for personal injury in cases in which the plaintiff cannot meet the conditions set forth in Article 17 for liability under the Convention itself. The task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Floyd*, 499 U.S. at 534 (internal quotation marks and citations omitted). It is inappropriate, however, to expect multilateral treaties, negotiated and drafted by numerous international delegates, to meet the standards of linguistic precision applicable to private contracts and domestic statutes. For that reason, "treaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotia-

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[5] Respondent suggests (Br. in Opp. 9-11) that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.*, provides an independent basis for permitting her state-law suit to proceed. That suggestion is without merit. The FSIA makes a foreign state and its agencies "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. In this context, that means that the Convention preempts state-law claims against airlines owned by foreign sovereigns to exactly the same extent that it preempts such claims against privately owned airlines. It does not somehow render the former class of airlines *more* susceptible than the latter to claims under state law.

tions, and the practical construction adopted by the parties." *Id.* at 535 (internal quotation marks and citations omitted).

Read together, the two paragraphs of Article 24 provide that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Cf. p. 4, *supra* (discussing final clause of Article 24(2)). To paraphrase that provision, "[i]n the cases covered by article 17," an injured plaintiff may sue an airline for personal injury only if she meets all of the "conditions" of, and "limits" on, liability set forth in the Convention. The central question in this case is the meaning of the phrase that triggers that preemptive effect: "cases covered by article 17."

In the governing French text, see *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 225 n.3 (1996), that phrase reads, "[d]ans les cas prévus à l'article 17," which, literally translated, means "in the circumstances anticipated [or 'foreseen'] in Article 17." See *Cassell's New French Dictionary* 130, 565-566 (1951). There are two ways to interpret that phrase. In respondent's view, and in the view of the court of appeals, the phrase narrowly denotes the cases in which the plaintiff could actually bring a cause of action under Article 17. Under that approach, a plaintiff who could *not* satisfy the liability conditions of Article 17 could nonetheless bring a cause of action under local law, and—precisely because she could not satisfy those conditions—she would be free of *all* of the "conditions and limits set out in this convention."

Under the alternative interpretation, the phrase "les cas prévus à l'article 17" serves as a shorthand for personal injury cases in general—which Article 17 addresses (or "anticipates") comprehensively—and distinguishes that class of cases from cases involving damaged or lost luggage and delay, to which Article 24(1) refers with the

parallel phrase "les cas prévus aux articles 18 et 19" (see *Zicherman*, 516 U.S. at 225 n.3). Under that interpretation, *any* personal injury action brought by a passenger against a carrier for events arising within the scope of the Convention would be "subject to the conditions and limits of this convention." Because those "conditions" and "limits" include Article 17's own substantive criteria for carrier liability, that interpretation of Article 24 would preclude suits under local law where those criteria are unmet: *e.g.*, where the passenger suffered no "bodily injury," see *Floyd*, *supra*, or where the injury did not arise from an "accident," see *Saks*, *supra*. For several reasons, we believe that this is the more faithful reading of the Convention.

First, this reading is consistent with the Convention's explicit textual insistence on international uniformity in the legal principles defining the circumstances under which a carrier will be exposed to liability. (As noted on p. 4 above, those principles are distinct from the remedial issues that the delegates expressly left for resolution under domestic law. See *Zicherman*, 516 U.S. at 230-231.) Indeed, the first substantive sentence of the Convention, contained in the preamble, emphasizes the necessity of "regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier." To achieve such uniformity, the Convention establishes a comprehensive set of legal principles governing the three major categories of liability (including personal injury) associated with international air travel, and it declares that those principles, along with the rest of the Convention, "shall apply to all international transportation of persons, baggage, or goods performed by aircraft." Art. 1(1). It is most unlikely that, despite those textual aspirations to legal uniformity, the Convention was intended to subject carriers to radically *non*-uniform liability under the peculiar legal regimes of the various

signatories for events occurring within the Convention's scope.[6]

The drafting history of the Convention confirms that conclusion. The question of Article 17's exclusivity typically arises in cases in which the event causing a passenger's injury was not an "accident"—in the broad sense applicable in this specialized context—because it was not "unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405.[7] The addition of the "accident" requirement came late in the drafting process; in the penul-

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[6] The court of appeals erroneously sought support for its contrary position in the fact that the delegates amended the formal title of the Convention "to refer to the unification of '*certain rules*,'" rather than all rules, relating to international transportation by air. Pet. App. 16a-17a. As the House of Lords aptly observed in *Abnett*, however, it is undisputed, and immaterial to the present analysis, that "the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. * * * Nothing is said in this Convention about the liability of passengers to the carrier, for example. Nor is anything said about the carrier's obligations of insurance, and in particular about the compulsory insurance against third party risks." *Id.* at 50a. The question presented here, however, is whether the Convention "unifies the rules" governing a subject that it *does* address: a carrier's liability to passengers for personal injury.

[7] The definition of "accident" has been "flexibly applied" in this context to include not just inadvertent harms, but reckless and even intentional torts as well, such as "torts committed by terrorists." *Saks*, 470 U.S. at 405. The term is often given a similarly expansive meaning in the context of insurance law: "In the absence of a policy provision on the subject, there is much support for the view that injury or death intentionally inflicted by a third person upon the insured is nevertheless due to accident or accidental means where it was neither foreseen, expected, nor anticipated *by the insured*." Tinio, *Accident Insurance: Death or Injury Intentionally Inflicted by Another as Due to Accident or Accidental Means*, 49 A.L.R.3d 673, 678 (1973) (emphasis added; footnotes omitted). The expansive scope of the term "accident" is one answer to the court of appeals' concern (Pet. App. 20a) that carriers not escape liability for their intentional torts. See also *id.* at 64a-65a.

timate draft, all sources of carrier liability were groupcd in a single Article, which, *inter alia*, made a carrier liable "in the case of death, wounding, or any other bodily injury suffered by a traveler." *Second Int'l Conference on Private Aeronautical Law, Minutes*, Oct. 4-12, 1929, Warsaw 264-265 (Horner & Legrez trans. 1975) (*Minutes*) (quoted in *Saks*, 470 U.S. at 401). That Article was split in three, and recast into what are now Articles 17, 18, and 19, "primarily because delegates thought that liability for baggage should commence upon delivery to the carrier, whereas liability for passengers should commence when the passengers later embark upon the aircraft." *Saks*, 470 U.S. at 402.

In adding the final clause of what is now Article 17—"if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking"—the delegates accomplished two objectives: first, they clarified that carriers would be liable for injuries that were triggered by events occurring during (or around the time of) the flight but did not become manifest until later, see *Minutes*, *supra*, at 166-167, and, second, they ensured that carriers would be liable only for events properly characterized as "accidents," see *Saks*, 470 U.S. at 405. In securing the latter objective, the delegates sought, of course, to confine the scope of a carrier's liability under the Convention. We have found nothing in the Convention's drafting history to suggest that the delegates intended, at the same time, to *expand* the scope of a carrier's unlimited liability under local law.[8] But that would be the obvious (and very signifi-

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[8] As observed in note 1 above, many international carriers voluntarily agreed in 1996 to waive the treaty-based limit on exposure to compensatory (though not punitive) liability. Such private agreements do not, of course, "purport to change or clarify the provisions of Article 17," and they "do[] not and cannot purport to speak for the signatories"

cant) consequence of their drafting change if the court of appeals' interpretation of the Convention's exclusivity provision were correct. The delegates' failure to endorse that consequence—or even to acknowledge it—strongly suggests that the court of appeals' interpretation is not correct, and that the Convention's liability provisions for personal injury are exclusive.

Finally, the overall structure of the Convention is far more consistent with that conclusion than with the court of appeals' approach. One provision illustrating that point is Article 23, which invalidates "[a]ny provision [in a travel contract] tending to relieve the carrier of liability" to passengers. By its terms, that provision appears applicable to any provision relieving carriers of *any* kind of liability to which they might be subject after ratification of the Convention. But the delegates' intricate compromise between the interests of passengers and the interests of carriers, see pages 2-3, *supra*, would be defeated if the Convention were construed not only to bar a carrier from contracting out of its *limited* liability under the Convention itself, but also to perpetuate its exposure to *unlimited* liability under local law and to prevent it from contracting out of that liability as well.

That the court of appeals' approach would produce such an asymmetric result, as well as several other interpretive anomalies noted by the House of Lords in *Abnett*, see Pet. App. 53a-56a, strongly suggests that the delegates intended for Article 17 to speak comprehensively to the subject of a carrier's liability to passengers for personal

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to the Convention. *Floyd*, 499 U.S. at 549. Moreover, according to amicus Air Transport Association of America (Br. 7-8), "[t]he consensus among the airlines" necessary to reach the 1996 agreement "was achieved with the common understanding that the Warsaw Convention provided the exclusive remedy for all injuries incurred during international air transportation."

injuries arising within the Convention's scope. As the House of Lords concluded, those delegates did not intend for the courts of the various signatories to "set[] alongside the Convention * * * an entirely different set of rules which would distort the operation of the whole scheme." *Id.* at 65a. That view of the House of Lords, as the final legal position of a sister signatory, is "entitled to considerable weight." *Saks*, 470 U.S. at 404.

2. The Court should limit its review to the first question presented in the certiorari petition. Respondent alleged, in addition to her personal injury claim, a claim for lost baggage. See Pet. App. 5a. While in Israel, she called petitioner's Tel Aviv office to inquire about her missing items. *Ibid.* Respondent testified that one of petitioner's agents informed her that she must take care of the matter in New York, and that petitioner was "not interested in [her] missing items." *Ibid.* When respondent returned from her trip—39 days after her flight—she provided written notice to petitioner's New York office of her missing baggage. *Id.* at 30a.

Article 18 of the Convention makes a carrier liable for baggage that is lost or damaged during international air transportation. Article 26, however, requires claimants to give the carrier written notice of any baggage damage within three days of the date of receipt. Under Article 26(4), "[f]ailing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part." The district court, following circuit precedent, explained that the fraud exception to the notice requirement "'is not of a restrictive nature,' but includes 'any intentional acts by the carrier or its agents which significantly decrease the likelihood of the shipper's giving notice during the brief period allowed.'" Pet. App. 31a (quoting *Denby* v. *Seaboard World Airlines*, 737 F.2d 172, 183 (2d Cir. 1984)). The district court held that respondent had satisfied the fraud standard and that she was therefore

not barred by the notice requirement from pursuing her claim for damaged baggage. *Ibid.* It then awarded her $1034.90 in damages. *Id.* at 32a-33a. Without analysis, the court of appeals rejected petitioner's cross-appeal challenging that award. *Id.* at 23a.

Petitioner argues that respondent's "trial testimony failed to meet the fraud standard required by Article 26(4)." Pet. 19. Petitioner does not argue, however, that the court of appeals' previously articulated construction of the fraud standard conflicts with the decision of any other court, nor does petitioner identify any other reason why that issue warrants this Court's review. This Court should therefore deny review of the second question presented in the petition.

## CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

FRANK W. HUNGER
*Assistant Attorney General*

EDWIN S. KNEEDLER
*Deputy Solicitor General*

JONATHAN E. NUECHTERLEIN
*Assistant to the Solicitor General*

ROBERT S. GREENSPAN
ALISA B. KLEIN
*Attorneys*

DAVID R. ANDREWS
*Legal Adviser*

DAVID S. NEWMAN
*Attorney-Adviser*
*Department of State*

NANCY E. MCFADDEN
*General Counsel*

PAUL M. GEIER
*Assistant General Counsel*

DALE C. ANDREWS
*Deputy Assistant General Counsel*
*Department of Transportation*

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